RECEIVED
JAN 0 3 2002
LDC

Nos. 00-1770 & 00-1781

Supreme Court, U.S.
FILED
DEC 20 2001
CLERK

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, PETITIONER

v.

PEARLIE RUCKER, ET AL., RESPONDENTS

OAKLAND HOUSING AUTHORITY, ET AL., PETITIONERS

v.

PEARLIE RUCKER, ET AL., RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief *Amici Curiae* of Lawrence Lessig, John J. Donohue, James Gordley, Gary Blasi, June Carbone, Jo Carrillo, Mary Jane Foran, and Cathy Mosbrucker In Support of Respondents

DAVID T. GOLDBERG*
99 Hudson Street, 8th Fl
New York, NY 10013
(212) 334-8813

JUDITH K. APPEL
DANIEL N. ABRAHAMSON
The Lindesmith Center
717 Washington Street
Oakland, CA 94607
(510) 208-7711

Attorneys for *Amici Curiae*
*Counsel of Record

BEST AVAILABLE COPY

TABLE OF CONTENTS

Statement of Interest 1

Summary of Argument 1

ARGUMENT

I. Contract Principles Do Not Support Evicting Respondents 5

A. The Parties' Legal Rights Are Determined By The Leases, Not The Federal Statute 5

B. Respondents Did Not "Consent" To Eviction Under These Circumstances 6

1. Under Contract Law Principles, The OHA Leases Do Not Constitute A Tenant's "Warranty" That Household Members Will Refrain From Drug Activity .. 7

2. Only "Serious or Repeated" Violations Give Rise To Eviction Under OHA's Lease 12

C. Eviction Under These Circumstances Would Not Be "Ordinary" 15

II. The Statute Is Not Reasonably Construed As Authorizing Respondents' Eviction 23

Conclusion 30

TABLE OF AUTHORITIES

Cases

1021-27 Ave. St. John Hous. Dev. Fund Corp. v. Hernandez, 584 N.Y.S.2d 990 (Civ. Ct. 1992) 20

A & B Cattle Co. v. City of Escondido, 192 Cal. App. 3d 1032 (Cal. Ct. App. 1987) 13

Allegheny County Hous. Auth. v. Hibbler, 748 A.2d 786 (Pa. Comm. 2000) 26, 27

Alma Motor Co. v. Timken-Detroit Axle Co., 329 U.S. 129 (1946) 5

Ashwander v. TVA, 297 U.S. 288(1936) 2

Bennis v. Michigan, 516 U.S. 442 (1996) 4, 5, 22, 28

BMW v. Gore, 517 U.S. 559 (1996) 4, 14, 15, 22

Boston Hous. Auth. v. Bryant, 693 N.E.2d 1060 (Mass. App. 1990) 15

Carroll v. Housing Opportunities Comm'n, 510 A.2d 540, (Md. 1986) 21

Chevron USA, Inc. v. NRDC, Inc., 467 U.S. 837 (1984) 8, 23

Cincinnati Metro. Hous. Auth. v. Harris, 1983 WL 8893 (Ohio App. June 15, 1983) 19

City of Chicago v. International College of Surgeons, 522 U.S. 156 (1997) 30

City of South San Francisco Hous. Auth. v. Guillory, 41 Cal. App. 4th Supp. 13 (Cal. Super. App. 1995) 19

Decatur Hous. Auth. v. Brown, 349 S.E.2d 501 (Ga. App. 1986) 15

Diversified Realty Group, Inc. v. Davis, 628 N.E.2d 1081 (Ill. App. 1991) 12

Frost v. Railroad Comm'n, 271 U.S. 583 (1926) 7

Gorsuch Homes, Inc. v. Wooten, 597 N.E.2d 554 (Ohio. App. 1992) 20

Hann v. Easton Hous. Auth., 709 F. Supp. 605 (E.D. Pa. 1989) 15

Harris v. Klure, 205 Cal. App. 2d 574 (Cal. Ct. App. 1962) 11

Heston v. Farmers Ins. Group, 160 Cal. App. 3d 402 (Cal. Ct. App. 1984) 8

Ilkchooyi v. Best, 37 Cal. App. 4th 395 (Cal. Ct. App. 1995) 7

Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co., 520 U.S. 510 (1997) 26

Jersey City Hous. Auth v. Jackson, 749 F. Supp. 622 (D. N.J. 1990) 15

Keating v. Preston, 108 P.2d 470 (Cal. Ct. App. 1940) . . . 18

Kickapoo Tribe v Babbitt,
43 F.3d 1491 (D.C. Cir. 1995) 26

Knight v. Black, 126 P. 512 (Cal. Ct. App. 1912) 20

Leonedas Realty Corp. v. Brodowsky,
454 N.Y.S.2d 183 (Civ. Ct. 1982) 19

Lynch v. San Francisco Hous. Auth.,
55 Cal. App. 4th 527 (Cal. Ct. App. 1997) 6

Machias Hotel Co. v. Fisher, 56 Me. 321 (1868) 16

McNeece v. Wood, 267 P. 277 (Cal. 1928) 8, 18, 21

Mid-Northern Mgmt, Inc. v. Heinzeroth,
599 N.E.2d 568 (Ill. App. 1992) 20

Miller v. Reidy, 260 P. 358 (Cal. Ct. App. 1927) 20

*Norfolk & W. Ry. Co. v. American Train
Dispatchers Ass'n*, 499 U.S. 117 (1991) 8

Pacific Mut. Life Ins. Co. v. Haslip,
499 U.S. 1 (1991) 10, 11

64 Park Ave. Corp. v. Blum, 78 N.Y.S.2d 818
(Sup. Ct. App. Term 1943) 16

Pennhurst State School & Hosp. v. Halderman,
465 U.S. 95 (1984) 6

People v. Ison, 346 N.W.2d 894
(Mich. App. 1984) 11

Perdue v. Crocker Nat'l Bank, 702 P.2d 503 (Cal. 1985) . 19

Plyler v. Doe, 457 U.S. 202 (1982) 17

Porter v. Warner Holding Co., 328 U.S. 395 (1946) 29

Powell v. Franco, 684 N.Y.S.2d 226
(App. Div. 1999) 20

*Richmond Tenants Org., Inc. v. Richmond Redev. &
Hous. Auth.*, 751 F. Supp. 1204 (E.D. Va. 1990) 16

Ross v. Gulf Oil Corp., 522 A.2d 97 (Pa. Super. 1987) . . . 20

Rowe v. Wells Fargo Realty Servs., Inc.,
166 Cal. App. 3d 310 (Cal. Ct. App. 1985) 16

Schenk v. Pro-Choice Network, 519 U.S. 357 (1997) . . . 2, 5

Scudder v. Perce, 114 P. 571 (Cal. 1911) 8

Seid Pak Sing v. Barker, 240 P. 765 (Cal. 1925) 11

Siler v. Louisville & N. R. Co., 213 U.S. 175 (1909) 2, 5

*Solid Waste Agy. v. U.S. Army Corps of
Engineers*, 531 U.S. 139 (2001) 28

Spence v. Gormley, 439 N.E.2d 741 (Mass. 1982) 17

Spence v. O'Brien, 446 N.E.2d 1070
(Mass. App. 1983) 18

Steele, v. Branch, 40 Cal. 3, 11 (1870) 20

Superior Motels, Inc. v. Rinn Motor Hotels, Inc.,
195 Cal. App. 3d 1032 (Cal. Ct. App. 1987) 18

Tenement House Dep't v. McDevitt,
109 N.E. 88 (N.Y. 1915) 17

Ticor Title Ins. Co. v. Employers Ins.,
40 Cal. App. 4th 1699 (Cal. Ct. App.1995) 13

United States v. Bajakajian, 524 U.S. 331 (1998) 4, 24

United States v. Foy, 416 F.2d 940 (7th Cir. 1969) 12

United States v. Leasehold Interest in 121 Nostrand Ave.,
760 F. Supp. 1015 (E.D.N.Y. 1991) 14

United States v. Poole, 878 F.2d 1389 (11th Cir. 1989) .. 17

United States v. Robinson,
721 F. Supp. 1541 (D. R.I. 1990) 6

Weber v. Aetna Casualty & Surety Co.,
406 U.S. 164 (1972) 17

West Va. Univ. Hosp., Inc. v. Casey,
499 U.S. 83 (1991) 28

Statutes and Legislative Materials

Pub. L. 106-185 22

Pub. L. 100-690 29

18 U.S.C. § 983(d)(2) 22

21 U.S.C. § 881(a)(7) 14

21 U.S.C. §844a(A) 13

42 U.S.C. § 11901(3) 24

42 U.S.C. § 1437b(a)(1) 9

42 U.S.C. § 1437n 24

42 U.S.C. § 1437d(*l*)(6) ..... *passim*

42 U.S.C. 1437d(c)(4)(A)(iii)(1994) 29

Cal. Civ. Code § 1442 20

Cal. Civ. Code § 1567 19

Cal. Civ. Code § 1642 8

Cal. Civ. Code § 1670.5 19

Cal. Civ. Code § 1671 19

Cal. Health & Safety Code § 11357(b) 14

Cal. Lab. Code § 432.7 14

Minn Stat. § 504B.171 16

H. R. Rep. 101-559 (1990) 25

S. Rep. 101-316 (1990) 25, 27, 30

Regulations

24 C.F.R. § 901.45(c) 24

24 C.F.R. 966.4(*l*)(5)(vii)(B) 25

66 Fed. Reg. 28,782 19

66 Fed. Reg. 50,032 6

Other Materials

AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) 9

HOMELESSNESS IN AMERICA (J. Baumohl, ed. 1996) 21

F. HARPER & F. JAMES, THE LAW OF TORTS (1956) 11

R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD & TENANT (1980) 16,17

Restatement (Second) of Property § 12.5 16

Restatement (Second) of Contracts § 241 18

Restatement (Second) of Contracts § 265 18

Interest of *Amici Curiae*[*]

Amici Curiae are California-based private attorneys and law professors who practice in the State's courts and teach students contract, property, and landlord/tenant law. As are other parties supporting Respondents, *Amici* are troubled by the circumstances giving rise to this case: an attempt to extend an avowedly "harsh" public policy approach to situations where its congressional proponents intended it would not apply – and do so with an indifference to individual considerations that Congress believed would be determinative.

Amici are also particularly concerned by a central theme of Petitioners' legal argument: that the measures defended here are in harmony with common law tradition – and that contract principles provide legal (and moral) authority for the evictions at issue. In fact, as we explain herein, application of common law principles to the idiosyncratic facts of this case would produce precisely the opposite result, precluding eviction of these tenant-Respondents. But equally important, contract and landlord-tenant doctrine, while solicitous of landlords' property rights and responsibilities to other tenants, are also sensitive to tenants' strong interest in continued occupancy and historically skeptical of claims (even those grounded on "consensual" lease terms) that minor or unavoidable lease violations, by tenants dealing in good faith, support termination.

To the extent that the Court addresses the broad statutory questions pressed upon it, it should do so, we believe, with a more balanced and realistic appreciation of this legal context.

Summary of Argument

Because the (limited) record in this case establishes at least

---

[*]All Parties have consented to the filing of this Brief, Sup. Ct. R. 37.3. It was not authored in any part by counsel for a party, and no party other than *Amici* and their counsel made a monetary contribution for its preparation and submission. Sup. Ct. R. 37.6.

the requisite "reasonable probability" that the tenant Respondents' suit will succeed and because the courts below correctly concluded that the other equitable factors tilt decisively in Plaintiffs' favor (a determination that Petitioners do not ask this court to disturb), the order preliminarily enjoining Petitioner Oakland Housing Authority (OHA) from evicting the tenants should be upheld.

First, although the parties and courts below devoted substantial attention to discussing when, if ever, federal law would permit housing authorities to evict tenants based on drug-related activities of which they are personally "innocent," *Amici* submit that this Court need not – and therefore should not – resolve that difficult and constitutionally sensitive question here. *See Ashwander v. TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring); *Siler v. Louisville & N. R. Co.*, 213 U.S. 175, 193 (1909); *Schenk v. Pro-Choice Network*, 519 U.S. 357, 384 n.12 (1997) (judgment may be sustained on any ground supported by the record).[1] Whatever the characteristics of lease terms and eviction regimes that the Affordable Housing Act, HUD's regulations, and the Constitution might hypothetically allow, ***the leases actually at issue in this case would not support Respondents' eviction***. Rather, a fair-minded reading of those agreements discloses: (1) that an OHA tenant would ***not*** expect eviction based solely on the misconduct of a household member in instances where the tenant had "do[ne] all [she could] to prevent the * * * activity," *see* J.A. 69, and (2) that eviction, in any event, is limited to cases of "serious or repeated" misconduct – not the one-time use of marijuana by teenage grandchildren that gave rise to

[1]Following the District Court, *Amici* will use the term "innocent" to refer to tenants who, like Respondents, did not participate in, know of, or foresee a third party's drug activity and took responsible steps to prevent its occurrence.

OHA's proceedings against Respondents Lee and Hill.[2]

This natural reading of the pertinent agreements, buttressed by blackletter rules requiring that ambiguities in leases be resolved against the drafting party and that forfeiture conditions, in particular, be strictly interpreted, would make eviction impermissible in this case. Indeed, that conclusion is all the more compelling here, given the central importance that Petitioners attach to Respondents' "consent." *See, e.g.*, HUD Br. at 17, 23, 47; OHA Br. at 7-14.

Relatedly, although there is no need for the Court to pass judgment on the hypothetical lease that HUD defends – *i.e*, one that provided "indiscriminately" for eviction of a tenant whenever a family member engaged in drug activity, no matter how insignificant, unforeseeable, far removed from public housing, or inconsequential for other tenants, *see* HUD Br. 33, 40 – *Amici* submit that Petitioners are wide of the mark in suggesting that such arrangements are "frequently" found in residential leases, *id.* at 23. Although leases sometimes include terms imposing a species of vicarious responsibility (for example, providing that the tenant is liable in damages for harm his guests do to landlord property), the "covenant" that HUD describes, where the eviction remedy is available for conduct that neither takes place on the property nor poses any plausible threat to other tenants' interests, is unorthodox. Moreover, when property owners do seek to enforce more usual (*i.e.*, less

[2]This Brief focuses on the validity of the preliminary injunction as it relates to Respondents Rucker, Lee, and Hill. The District Court grounded its protection of Walker on its view that his Americans With Disabilities Act claim had a fair chance of success – a decision that the Ninth Circuit affirmed and that neither Petitioner asks this Court to review. *See* HUD Br. at 9-10 n.5; OHA Br. at 16 n.7. Also, though HUD notes in passing that the preliminary relief awarded was not confined to the named Plaintiffs' cases, Br. at 9, it mounts no distinct challenge to the injunction on that basis.

sweeping) tenant commitments, courts will duly consider: (1) the parties' respective bargaining power; (2) the strength of the tenant's interest in continued occupancy; (3) the character and severity of the misconduct; (4) the extent of the conduct's foreseeability and of the tenant's knowledge and involvement (if any); and (5) the availability to the landlord of less severe alternative means of achieving its objectives.

Tellingly, these considerations overlap substantially with those highlighted in this Court's recent decisions addressing the constitutionality of regimes that, like this one, seek to use property deprivation to punish or deter disfavored conduct, *see BMW v. Gore*, 517 U.S. 559 (1996); *United States v. Bajakajian*, 524 U.S. 331, 334 (1998); *see also Bennis v. Michigan*, 516 U.S. 442, 454 (1996) (Thomas, J., concurring), and protected by the Congress that enacted the statutory provision whose meaning is in dispute. They point to a distinct, narrower ground for upholding the preliminary relief awarded in this case.

Even if these OHA leases were iron-clad in providing for eviction *and* even if the federal law could be construed, as Petitioners and dissenting judges below read it, as declining to give innocence dispositive weight in every case, the statute is not fairly read to authorize eviction of individuals in Respondents' circumstances. Whether or not housing authorities have "discretion" to treat tenant innocence as outweighed in any individual case by other circumstances militating in favor of eviction, the statute ***cannot*** be construed – as it would have to be, to overturn this preliminary injunction – as empowering public landlords to ***ignore*** those traditional, equitable considerations and seek eviction in cases where, as with Respondents', those point uniformly in the opposite direction. Discretionary authority of this latter sort is rare and constitutionally problematic. Congress did not confer it here.

ARGUMENT

I. Contract Principles Do Not Support Evicting Respondents

A. The Parties' Legal Rights Are Determined By The Leases, Not The Federal Statute

Although HUD's characterization of this as a "case involving statutory interpretation," Br. at 18, and its vigorous defense of its regulations are understandable in light of the reasoning of the Court of Appeals, *Amici* submit that the facts and procedural posture of this case indicate a different "starting point," *id.*, for the Court's review. Because the preliminary injunction, by its terms, binds OHA (but not HUD), *see* Pet. App. at 165a-166a, and because it is Plaintiffs' "consent" to OHA's leases (and not the mandates of the federal law, which are directed at public housing *authorities*, not *tenants*) that supplied the claimed basis for the evictions at issue, review should begin with a close examination of the obligations those leases actually impose. Such an analysis discloses an adequate basis for concluding that Plaintiffs have a reasonable probability of success: those leases are fairly read as (a) obliging OHA tenants only to "do all [they] can" to prevent household member involvement in drug activity and (b) limiting OHA's power to terminate tenancy to instances of "serious" misconduct, precluding eviction here. Accordingly, the preliminary injunction may, and under the Court's precedents, should, be sustained on that basis. *See Siler*; *Schenk*; *cf. Alma Motor Co. v. Timken-Detroit Axle Co.*, 329 U.S. 129 (1946).[3]

---

[3]Because the lease interpretation arguments were presented to – though not relied on by – the District Court and because the relevant questions are matters of law (which need only be resolved preliminarily, in any event), there is no barrier to the Court's affirming the judgment on this basis. *But*

B. Respondents Did Not "Consent" To Eviction Under These Circumstances

The fact that Plaintiffs' signatures appear on OHA leases plays a pivotal role in Petitioners' argument to this Court, supplying both the ostensible authority for evicting them and a means of defusing otherwise troubling constitutional difficulties, *see* HUD Br. at 47 (arguing that § 1437d(*l*)(6) "is constitutional because * * * it provides for consensual lease clauses"); *id.* at 17 (characterizing eviction as "enforcement of Plaintiffs' contractual commitment").

At the outset, *Amici* do not agree that tenant consent would in any event have the sweeping significance that Petitioners seek for it. It is, to say the least, unrealistic to describe Respondents as having "made a choice" when they signed their leases. *See* HUD Br. at 46 (asserting that they were "free to find other housing"). They are poor, elderly individuals paying monthly rent in the tens and low hundreds of dollars, whose "option" would be to vacate homes they had inhabited for decades and seek housing in a market where HUD itself estimates "fair rents," to be many times as high. *Compare, e.g.*, J.A. 49 (Rucker's lease, specifying $261.00 monthly rent for four-bedroom apartment) *with* 66 Fed. Reg. 50,032 (Oct. 1, 2001) (determining that "fair market" rent for four-bedroom apartment in Oakland is $2,035.00); *see United States v. Robinson*, 721 F. Supp. 1541, 1543 (D. R.I. 1990) (forfeiture of federally assisted tenant's leasehold "would be, in effect, a

---

cf. n.14 *infra* (discussing District Court's ruling that certain State law defenses – but not the contract interpretation defense addressed here – were preempted). Nor is this a case, *see Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 95 (1984), where a defendant's Eleventh Amendment immunity limits injunctive power. *Lynch v. San Francisco Hous. Auth.*, 55 Cal. App. 4th 527 (Cal. Ct. App. 1997) (California housing authorities are not the State for Eleventh Amendment purposes).

sentence of homelessness"). State law attaches diminished significance to "consent" under such circumstances (especially when the term consented to is itself an unfair one), *see, e.g.*, *Ilkchooyi v. Best*, 37 Cal. App. 4th 395 (Cal. Ct. App. 1995), and it is similarly settled that terms attached to governmental benefits are not insulated from constitutional scrutiny by the fact that a recipient was free to turn down the "offer," *e.g.*, *Frost v. Railroad Comm'n*, 271 U.S. 583 (1926).

1. Under Contract Law Principles, The OHA Leases Do Not Constitute A Tenant's "Warranty" That Household Members Will Refrain From Drug Activity

But there is an even more basic flaw in Petitioners' argument here. The hypothetical lease they seek to defend in this Court – one in which it is accepted that "any" drug activity engaged in by a household member, irrespective of its seriousness or foreseeability or the tenant's efforts to prevent it, can supply the basis for evicting the tenant – ***is not the one*** that the Respondent tenants actually signed with OHA.

The evictions sought here depend primarily on two clauses in Respondents' leases. The first, paragraph 9(m), imposes an obligation to "assure that the tenant, any member of the household, a guest or another person under the tenant's control shall not engage in * * * any criminal activity on or near the premise[s]," J.A. 59. Paragraph 14(d) delimits when the Housing Authority "may terminate tenancy": in cases of "the Tenant's serious or repeated violation of material terms of this lease, such as not making payments due, not complying with paragraph 9, or other good cause." J.A. 64.

Also significant is an instrument, executed contemporaneously with the leases and titled "Tenant Agreement to Maintain A Drug-Free Environment." J.A. 69.

By signing that document, the tenant attests to having been told about OHA and HUD policy regarding drug-related criminal activity, affirms her awareness of paragraph 9(m), and makes the following commitment:

> I agree to comply with the OHA's policy regarding drugs and drug-related criminal activity and to do all I can to prevent the use, sale or possession of drugs in my unit or the involvement in drug-related criminal activity by my household or guests. I also agree to inform all my household members and guests of OHA's policy regarding drugs and drug-related criminal activity.

Id. Because ¶9(m), when considered together with this Agreement specifically setting out tenant obligations concerning drug-related activity, *see* Cal. Civ. Code § 1642 (multiple writings to be considered single contract); *Scudder v. Perce*, 114 P. 571 (Cal. 1911) (specific contract provisions control general ones), is plausibly understood as obliging tenants (only) to "do all [they] can to prevent" others' drug activity, it must be so construed. *See Heston v. Farmers Ins. Group*, 160 Cal. App. 3d 402 (Cal. Ct. App. 1984) (uncertainty in form contract is construed against drafter); *McNeece v. Wood*, 267 P. 277, 284 (Cal. 1928) ("If the agreement can be reasonably interpreted so as to avoid [a] forfeiture, it is our duty to do so").[4]

---

[4]It is axiomatic that these and similar rules governing the construction and effect of ambiguous terms "enter into and form part of [every contract], as fully as if they had been expressly * * * incorporated in its terms." *Norfolk & W. Ry. Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 130 (1991) (citation omitted).

To the extent that principles requiring deference to administrative constructions of ambiguous statutes, *see Chevron USA, Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), have application in a dispute between *contracting parties* concerning the meaning of terms in an agreement between them, they

Unlike the surrounding provisions, which impose straightforward duties "to use the dwelling for private purposes," "to keep the dwelling * * * clean," or "to refrain from scattering rubbish," ¶9(m) asks the tenant "to *assure*" that certain conduct (unrelated to the tenancy) will not occur. Although, to be sure, an "assurance" may mean a warranty – *i.e.*, an undertaking to assume the entire risk that some event outside the party's control will occur – that is not its most common meaning, and it is a singularly implausible one here. As a brief in this case illustrates, the term "assure" is more commonly used to refer to an expressed commitment that increases the listener's confidence that something will or will not happen, not as an absolute guarantee. *See* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) 110. When HUD states that its construction of the statute, if accepted, would enable housing authorities "to *assure* the families who make their homes in public housing that they will have a safe, drug-free environment," Br. at 18 (emphasis added), it presumably contemplates housing authorities' doing *everything reasonably in their power* to make certain that the desired result comes to pass, not their warranting an absolutely safe environment.[5]

Here, tenants who both gave their assurance – in the form of the OHA-drafted "Agreement" – and who fulfilled the

---

cannot supercede interpretive rules designed to encourage clear drafting and protect promisors from unfair surprise. A tenant's acknowledgment that she was "told about" HUD regulations by a housing manager, J.A. 69, although conceivably raising case-specific factual questions, does not detract from this general point.

[5]Similarly, when the federal government invoked its "*duty* to provide public * * * housing that is decent, safe, and free from illegal drugs" 42 U.S.C. § 1437b(a)(1), it presumably did not take upon itself legal responsibility for every subsequent "breach."

substantive obligations described therein, "[1] to comply with the OHA's policy * * * [2] to do all [they] can to prevent [others'] drug-related criminal activity * * * and [3] to inform * * * household members and guests of OHA's policy," could justifiably conclude that they had fulfilled their obligations under ¶9(m).[6]

Nor, as is explained more fully below, is it right that a "covenant" of the sort HUD defends would be fundamentally similar to others that appear in tenants' leases with OHA. *See* HUD Br. at 23, 24 (citing, *inter alia*, ¶9(k), which provides that "[t]enant shall pay such charges for * * * repair[s]* * * made necessary by the action(s) or neglect of the Tenant, members of the household or guests" and ¶9(g), which obliges tenants "[t]o keep [the] dwelling unit and such other areas as may be assigned to the tenant * * * in a clean and safe condition," including "causing members of the household and guests" to do so); *see also id.* at 35 (analogizing to liability without fault, citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991)).

The "responsibility" that Petitioners contend that ¶9(m) imposes would be *unlike* those neighboring lease clauses – not because it is indifferent to the tenant's "state of mind," HUD Br. at 30, 33 – but rather because it would not be fairly

[6]The tenant's undertaking to "cause" desirable behavior by guests and household members must likewise be interpreted in light of its basic parallel with the Agreement. *Compare* J.A. 59 ("the tenant is obligated to comply with * * * and is responsible for causing members of the household and guests to comply with" OHA rules) *with* J.A. 69 (providing that the tenant personally "comply * * * and do all [she] can" to control others). Although the Agreement also asks the tenant to indicate "aware[ness]" that she "may be evicted," on account of a household member's drug activity, *id.*, that acknowledgment is fairly read, in context, as referring to the possibility of eviction based on other parties' conduct *that the tenant has failed to do all that she could to prevent.*

described as addressed to *acts or omissions of the tenant. See Seid Pak Sing v. Barker*, 240 P. 765 (Cal. 1925) (applying "*noscitur a sociis*" maxim in interpreting lease). Unlike a regime of liability without fault – where the defendant is held monetarily liable for damage she *causes*, without further inquiry into motive or negligence – or lease obligations that impose duties relating to the use of the premises the landlord has conveyed to the tenant, the construction of ¶9(m) for which Petitioners argue is as a "warranty," whereby the tenant assumes an "obligation," to see that events that are unforeseeable and outside her control never occur. *Harris v. Klure*, 205 Cal. App. 2d 574 (Cal. Ct. App. 1962) ("interpretation should be avoided which will make the contract unusual, extraordinary, harsh, unjust or inequitable").[7]

Indeed, it may be because such an obligation is so *un*common that Petitioners' Briefs repeatedly resort to the language of culpable *action* in describing OHA's grievance with Respondents. *See, e.g.*, HUD Br. at 16 (describing policies as aimed at tenants who "harbor" "drug criminals"); OHA Br. at 3 (same). *But see, e.g., People v. Ison*, 346 N.W.2d 894, 897

[7]As the District Court recognized, Pet. App. 85a-86a, obligations that relate to the use of the unit inherently incorporate an element of tenant control – both because the tenant can limit access to the unit and also because such duties typically are within the tenant's power to perform himself, if efforts to "cause" others to do so are unavailing.

Nor is the *Haslip* analogy apt: although that decision dealt with a form of "vicarious" (*i.e.*, employer) liability, it involved conduct that, under common law agency principles, *was* that of the corporate defendant. 499 U.S. at 14. Moreover, rules of strict tort liability are grounded on assumptions that it is more just and efficient to shift the costs of injury from the injured party to the party whose actions caused harm. *See* 2 F. HARPER & F. JAMES, THE LAW OF TORTS (1956). These rationales likely support entirely different rules in a case where the parties are, respectively, a public housing tenant and a government agency.

(Mich. App. 1984) ("intent to encourage, counsel, or assist * * * in evading lawful custody" is element of a harboring offense); *United States v. Foy*, 416 F.2d 940, 941 (7th Cir. 1969).

2. Only "Serious or Repeated" Violations Give Rise To Eviction Under OHA's Lease

But even if it could be concluded that any drug activity by any household member anywhere can be a *violation* of the tenant's ¶ 9(m) obligation to "assure" – and if such an interpretation were constitutionally and statutorily permissible – OHA's lease limits its authority to evict to "*serious or repeated* violations of material terms of this lease, such as not making payments, not complying with paragraph 9, or other good cause." ¶14(d) (emphasis added). Thus, although HUD has taken the position that *the statute* authorizes eviction for "any" household member drug activity – and not merely "repeated or serious"activity, HUD Br. at 33 (citing 56 Fed. Reg. at 51,567) – that is simply not what OHA's agreement with its tenants provides.[8]

---

[8]Realistically, ¶14(d) can only be read as limiting eviction to cases where breaches of ¶9(m) are "serious or repeated." Because ¶9(m) falls within "paragraph 9," a violation could not constitute "*other* good cause," nor can the lease be read as making "not complying with ¶9" *per se* a "serious * * * violation." Given that ¶9 contains almost all the lease's variegated tenant obligations, such a construction would not only be grammatically doubtful (rendering authority to evict for "repeated" violations superfluous) but, to pronounce every violation of ¶9 "serious" would drain that term of its plainly intended effect as a limitation on landlord power. *See Diversified Realty Group, Inc. v. Davis*, 628 N.E.2d 1081, 1085 (Ill. App. 1991) (similar language in Section 8 lease was "clearly intended to give tenant * * * some measure of objective protection").

Nor can the sentence in ¶14(e) indicating that "Management also considers * * * any drug-related activity on or near such premises by Tenant, members of household, or guests as grounds for termination under this provision" be read as relaxing the restraint of ¶14(d). That statement, made

Whether the "serious[ness]" of a violation of ¶9(m) is to be gauged with reference to the personal culpability of the tenant, *see* ¶14(d) (eviction triggered by "the *Tenant's* serious or repeated violation[s]") (emphasis added), the gravity of the underlying drug activity, or, most reasonably, some combination of both, eviction would be unauthorized here. If the focus is on the tenant's personal culpability, the record, as it stands, establishes that, far from a "serious violation," there was *no* breach of Respondents' assurances to OHA that they would "do all [they could] do to prevent" drug activity. Nothing contradicts their sworn statements (1) that they did not know of, participate in, foresee, or condone the drug activity of their children and grandchildren, and (2) that they acted affirmatively to prevent and warn against drug activity, *see* J.A. 31, 34, 39, 44.

Nor could Plaintiffs fairly be expected to understand that a single incident of marijuana possession by a teenage grandchild was the sort of "serious" misconduct that would terminate their tenancy.[9] *Ticor Title Ins. Co. v. Employers Ins.*, 40 Cal. App. 4th 1699 (Cal. Ct. App.1995) (words of contract are to be understood according to their ordinary and popular meaning). Under federal law, possession of a personal use amount of marijuana is punishable by a civil penalty only, 21 U.S.C. §844a(A). California has gone farther still, "decriminalizing" possession of small amounts, *A & B Cattle*

---

in the lease part dealing with *notice*, only confirms that when drug-activity evictions *are* properly pursued (*i.e.*, when the requirements of 14(d) are satisfied), they will be sought on the fast-track, with no more notice provided than the minimum "reasonable under the circumstances."

[9]Neither of the teenagers "ha[d] any prior arrests or other incidents involving marijuana or other drug use or possession." Plaintiffs' Memorandum in Support of Motion For Preliminary Injunction, *Rucker v. Davis*, No. C-98–00781 (N.D. Cal. Apr. 3, 1998) at 25.

Co. v. City of Escondido, 192 Cal. App. 3d 1032, 1042 n.14 (Cal. Ct. App. 1987), to the point where a $100 fine is the maximum punishment for a first offense, Health & Safety Code § 11357(b), and it is *illegal* for an employer to consider a prospective employee's prior record under that statute. Lab. Code § 432.7; *cf. BMW*, 517 U.S. at 583 (measuring excessiveness of punitive damage award by "comparing [it] to civil and criminal penalties that could be imposed for comparable misconduct").[10] According to recent U.S. Government estimates, 76 million Americans – including 43.5% of all 18 year-olds – report having tried marijuana at some point in their lives. *See* http://www.samhsa.gov/oas.[11]

---

[10]*Compare also United States v. Leasehold Interest in 121 Nostrand Ave.*, 760 F. Supp. 1015, 1026 (E.D.N.Y. 1991) (noting that under HUD and Justice Department Guidelines, the United States would seek forfeiture under 21 U.S.C. § 881(a)(7) only if a property was an "open and notorious site of drug distribution," where "compelling evidence" establishes "at least two drug felonies," *and* were the leaseholder him- or herself was involved in the criminal conduct). Moreover, even where those stringent conditions were satisfied, the Guidelines provided for "[c]areful consideration" of "factors involving family members of the violator" and required that "[a]ppropriate human resource services support (i.e. child welfare, emergency shelter, etc.) * * * be prearranged where minors or the elderly are [a]ffected," *id.*

[11]Although Rucker's (disabled) daughter was found in possession of cocaine, which local law punishes more harshly than simple marijuana possession, her case implicates a further way in which OHA's actual terms are less stringent than those Petitioners defend. OHA tells tenants that the "One Strike" policy is limited to instances of illegal drug use that "interfere[] with the health, safety, and peaceful enjoyment of the premises by other residents." J.A. 69. *See* HUD Br. at 43 (describing *precisely that limitation* as a "considerably stricter standard for cause for eviction" than the one defended here).

Because proof of "interference" with residents is required, the daughter's "drug activity" – *possession* off premises (the cocaine was discovered during a search incident to arrest for a suspected *alcohol* offense)

Against this background, intimations that these tenants were "harbor[ing] drug criminals," HUD Br. at 16, or allowing their units to become "haven[s] for drug users and dealers," *id.* at 30 – or that their eviction was necessary to "rid public housing projects of those whose tenancy threatens the safety and security of their neighbors," *id.* at 48-49, ring decidedly hollow. *Cf. Hann v. Easton Hous. Auth.*, 709 F. Supp. 605, 609 (E.D. Pa. 1989) (rule against cohabitation by unmarried tenants would "exclude such a large number of people from rental assistance [as to] be unconscionable").[12]

C. Eviction Under These Circumstances Would Not Be "Ordinary"

Even laying aside the peculiarities of the leases that actually gave rise to this case, Petitioners' arguments proceed from another faulty premise: that the (hypothetical) lease terms defended are commonly found in residential leases, and that, if consented to by a tenant, they would, as a matter of contract law, be strictly enforced.

– can not qualify. *See Decatur Hous. Auth. v. Brown*, 349 S.E.2d 501, 503 (Ga. App. 1986) (sustaining conclusion that "the mere violation of marijuana possession even on two occasions [neither] creates a hazardous situation for other tenants nor interferes with their peaceable possession"); *accord Jersey City Hous. Auth v. Jackson*, 749 F. Supp. 622, 633 (D. N.J. 1990); *see also Boston Hous. Auth. v. Bryant*, 693 N.E.2d 1060 (Mass. App. 1990).

[12]Both Petitioners fault the decision below for considering factual situations other than those actually before the court in construing the statute. But their own Briefs strain visibly to assimilate the misdemeanor conduct that gave rise to this case to that which impelled Congress to act. For example, rather than quote directly the congressional finding that "*drug dealers* are increasingly imposing a reign of terror," (emphasis added), HUD (perhaps mindful of the absence of drug dealing allegations from this case) describes Congress's having found a "'reign of terror' caused by the presence of drug *criminals*," Br. at 44 (emphasis added).

Although *Amici* cannot represent that such a "covenant" is without precedent, the very features that HUD defends – forfeiture based on third-party conduct, however minor, that is unforeseeable and outside tenant's control, that in no way relates to the unit itself, and poses no genuine threat to other tenants' health, safety or property interests, *See* Br. 33, 40 – are *unlike* the examples they cite as analogous, uncommon in *Amici*'s experience, and in derogation of both historic and modern rules of landlord-tenant law. *See, e.g.*, R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD & TENANT (1980) (at common law, lessor had little control of tenant's use of property); Minn Stat. § 504B.171 (imposing uniform lease covenant against "allow[ing] controlled substances in th[e] premises," but limiting violations to cases where tenant "knew or had reason to know of [third-party's possession]").

Although tenants are routinely held (financially) *liable* for damage done to leased premises, including by guests and family members, and can be subject to eviction for using a landlord's property in a way that threatens harm to others, it is *not* "common" for a lease to provide for eviction for an isolated illegal act, *see* Restatement (Second) of Property § 12.5 comment c, especially a minor one, *Rowe v. Wells Fargo Realty Servs., Inc.*, 166 Cal. App. 3d 310, 319 (Cal. Ct. App. 1985) (declining eviction for commercial tenant's "minor regulatory violation") -- let alone to regulate tenant conduct that is off-premises and unrelated to his tenancy. *Machias Hotel Co. v. Fisher*, 56 Me. 321 (1868) (refusing to terminate lease of defendant convicted of selling intoxicating liquor off-premises); *64 Park Ave. Corp. v. Blum*, 78 N.Y.S.2d 818 (Sup. Ct. App. Term 1943) (lease provision has "no application to conduct or acts committed off the demised premises"); *Richmond Tenants Org., Inc. v. Richmond Redev. & Hous. Auth.*, 751 F. Supp. 1204, 1206 (E.D. Va. 1990) (prohibiting eviction for off-

premises alcohol misconduct, because "it is unreasonable to make misdemeanors, even if repeated, grounds for eviction, when the offense bears no relation to the housing development"); *see also* R. SCHOSHINSKI § 6.1 at 377 (at common law, damages provided sole remedy for lessee's breach of covenant).[13]

---

[13]HUD's suggestion that evictions (of whole families) for single minor infractions off premises are protective of "health and safety," on the ground that individuals who engage in such are "not unreasonab[ly]" presumed likely to commit anti-social acts *on premises*, Br. at 45, runs the nuisance analogy into the ground. Jurisdictions that try seriously to tie evictions to ongoing danger require a far greater showing than HUD could make in these cases. *See Tenement House Dep't v. McDevitt*, 109 N.E. 88 (N.Y. 1915) (Cardozo, J.); *cf. Spence v. Gormley*, 439 N.E.2d 741, 750 (Mass. 1982) (acknowledging that eviction even for violent conduct is unnecessary if the offending individual has subsequently been incarcerated).

As did the dissent below, Petitioners have invoked a litany of justifications for a policy of the sort they defend. At least one of the stated objectives – deterring potential drug criminals with the threat that their innocent relatives will suffer forfeiture, far from being "worthwhile," HUD Br. at 36, is constitutionally pernicious. *See Weber v. Aetna Casualty & Surety* Co., 406 U.S. 164, 175 (1972); *Plyler v. Doe*, 457 U.S. 202, 220 (1982) (however "expedient," acting against children for parents' wrongdoing was unconstitutional). A second rationale – enhancing housing authority "bargaining power" to "obtain [a tenant's] agreement" HUD Br. at 36, to sanctions short of eviction – is puzzling. The same objective surely could be accomplished without ever dropping the Damoclean sword on innocent individuals: *e.g.*, with a lease term providing, in substance, "tenant agrees with all steps (short of eviction) that landlord proposes to deal with drug activity."

Finally, assertions about the "enormous" difficulty of proof, HUD Br. at 35-36 are, at the least, overwrought. While the argument seems to assume that housing authorities would be confined to relying on direct evidence, even in a criminal prosecution – where proof beyond a reasonable doubt is required – "all elements * * * can be proven by * * * circumstantial evidence." *United States v. Poole*, 878 F.2d 1389, 1391-92 (11th Cir. 1989); *see id.* ("Evidence of surrounding circumstances can prove knowledge.

And the assumption that eviction would proceed on the ground that "a deal is a deal" fails to do justice to the contract principles that Petitioners insist should govern. First (even in the absence of ambiguities), it is settled law that not every breach of a contractual term will be considered "material," and courts considering contract claims will hold a promissee's obligations satisfied by substantial performance, *See Superior Motels, Inc. v. Rinn Motor Hotels, Inc.*, 195 Cal. App. 3d 1032, 1051 (Cal. Ct. App. 1987) ("The law sensibly recognizes that * * * not every breach justifies treating the contract as terminated") (citations to Restatements and treatises omitted); *Keating v. Preston*, 108 P.2d 470 (Cal. Ct. App. 1940) (violation of implied covenant not to use premises for gambling was so "slight and trivial * * * that it does not constitute ground for terminating the lease"); Restatement (Second) of Contracts § 241 (in deciding whether breach is material, court should consider, *inter alia*, whether promisor fulfilled duty of good faith and fair dealing and "extent to which the party failing to perform * * * will suffer forfeiture").

And the notion that a contracting party will not be liable for breach of a condition when the reasons for nonperformance were unforeseeable and beyond her control is not an innovation of the district court in this case: it is a staple of contract law. *See* Restatement (Second) of Contracts § 265; *cf. McNeece*, 267 P. at 285.

Further, a tenant's "consent" to subject herself to eviction for a grandchild's minor, harmless and unforeseeable

---

[P]ossession * * * can be established by showing ownership or dominion and control over the drugs or over the premises on which the drugs are concealed. Intent to distribute can be proven circumstantially from * * * the quantity of [drugs] involved"); *see also Spence v. O'Brien*, 446 N.E.2d 1070 (Mass. App. 1983).

misdemeanor – the "bargain" HUD hypothesizes – would not necessarily be given conclusive effect. The fact of consent does not preclude a court from inquiring whether a contract or a particular term is unconscionable, especially where the parties' bargaining power is, as here, highly unequal. *See* Civ. Code §§ 1567, 1670.5 (on finding clause unconscionable, court may "limit [its] application * * * [so] as to avoid any unconscionable result"); *Leonedas Realty Corp. v. Brodowsky*, 454 N.Y.S.2d 183 (Civ. Ct. 1982) (holding "singles only" lease provision unconscionable, citing county's 2% vacancy rate).[14]

Principles of contract interpretation also foreclose enforcement of even agreed-to penalty clauses. *See, e.g., Perdue v. Crocker Nat'l Bank*, 702 P.2d 503 (Cal. 1985); Cal. Civ. Code § 1671. Resistance to such clauses is grounded not only on considerations of fairness, but also on recognition that

---

[14]The District Court ruled, erroneously in our view, that a California law unonscionability defense would be preempted here, *see* Pet. App. at 81a-82a. At the outset, a court would not be applying "contract principles" were it to hold those rules "preempted" in any instance where their neutral application would operate to defeat eviction. *See Cincinnati Metro. Hous. Auth. v. Harris*, 1983 WL 8893 (Ohio App. June 15, 1983) ("when a public housing agency * * * uses the courts of this state to enforce a remedy made available by the state, *viz.*, forcible entry and detainer * * * it subjects itself to those powers, legal and equitable, which state law reposes in its courts with respect to such actions"). Congress did not expressly provide for preemption, and there is no actual conflict between a provision that requires inclusion of lease terms – but does not "require[] or encourage[] * * * terminations," 66 Fed. Reg. 28,782, and a court's applying contract or equity principles in any particular case. Although it is conceivable that a State common law rule could so frustrate Congress's aim of ending drug dealers' "reign of terror" in public housing as to warrant preemption, congressional purposes are furthered, not disserved by exercises of judicial discretion. *See infra*. *But see City of South San Francisco Hous. Auth. v. Guillory*, 41 Cal. App. 4th Supp. 13 (Cal. Super. App. 1995) (giving very broad preemptive effect to federal law).

parties do not always expect the penalties to be imposed, *Steele, v. Branch*, 40 Cal. 3, 11 (1870), and concern that they not have perverse incentives to seize on minor breaches, *see Ross v. Gulf Oil Corp.*, 522 A.2d 97 (Pa. Super. 1987).

Essentially similar concerns inform the traditional reluctance to enforce forfeiture conditions in leases. *See, e.g.*, Cal. Civ. Code § 1442. Not only are such claims scrutinized under an especially rigorous version of the rule of construction against the drafter, *see Miller v. Reidy*, 260 P. 358 (Cal. Ct. App. 1927) ("[h]e who claims a forfeiture must have closed every avenue of escape to his opponent"), but courts asked to impose a forfeiture will be more willing to overlook minor violations, *Steele*, 40 Cal. at 11 ("the law abhors a forfeiture, and therefore will ordinarily be satisfied with a substantial compliance of a [forfeiture] condition"), and will refuse to impose [] forfeiture if the landlord's legitimate interests could be served through a less drastic remedy. *See Powell v. Franco*, 684 N.Y.S.2d 226 (App. Div. 1999); *1021-27 Ave. St. John Housing Dev. Fund Corp. v. Hernandez*, 584 N.Y.S.2d 990 (Civ. Ct. 1992) (noting authority distinguishing between "cases which warrant the forfeiture of the subject premises [and] those which have fashioned relief other than forfeiture"); *see also Gorsuch Homes, Inc. v. Wooten*, 597 N.E.2d 554, 561 (Ohio. App. 1992) ("Ohio courts have the power, and often exercise it, to relieve a tenant from the consequences of forfeiture"); *Mid-Northern Mgmt, Inc. v. Heinzeroth*, 599 N.E.2d 568, 572 (Ill. App. 1992) (similar).

Whether such judicial intervention is considered an exercise of equitable power or enforcement of a legal rule implied in every contract, it would likely rule out eviction here, even if tenants' leases were as HUD has assumed them to be. *See Knight v. Black*, 126 P. 512 (Cal. Ct. App. 1912) ("the very nature of the action, involving, as it does, a forfeiture, appeals

to the equity side of the court, and * * * requires a full examination of all of the equities involved to the end that exact justice be done"); *McNeece*, 267 P. at 285 ("it would * * * appear to be highly inequitable to forfeit the lease on account of one act of unlawful possession on the part of the employee of the sublessee in the absence of some notice or knowledge of the infraction of the law on the part of the lessee or his subtenant").[15]

Finally, although there is no need to settle this case on constitutional grounds, it bears emphasis that these common law and equitable considerations converge substantially with concerns articulated in recent decisions of this Court construing

---

[15]The punishment sought here is in gross disproportion to the wrong, however described. In strictly economic terms, Respondents' housing subsidies are worth thousands of dollars. *See Carroll v. Housing Opportunities Comm'n*, 510 A.2d 540, 545 (Md. 1986). But the less quantifiable effects of being evicted from one's home of thirty years – being uprooted from work and childcare arrangements, friends and family – can be equally serious. Finally, poor families – stamped with the stigma of drug eviction – face almost insurmountable odds in tight housing markets. *See* E. Lindblom, *Preventing Homelessness*, HOMELESSNESS IN AMERICA (J. Baumohl, ed. 1996) at 189 (stressing link between evictions and family homelessness).

Although Petitioners suggest that the policies amount to little more than a routine reallocation of a scarce governmental resource (housing assistance) – from "drug criminals" to "some of the numerous households [on waiting lists] who would not pose a similar threat," *see* HUD Br. at 16 – that line of argument is unworthy of Petitioners. Even putting aside empirical doubts that new tenants (and grandchildren) will – whatever assurances they give – prove more able to live up to the Government's standards of rectitude than those evicted, there can be no equivalence, from a tenant's standpoint, between being evicted and failing to more swiftly climb a waiting list for desired housing. *But see* OHA Br. at 43 (analogizing eviction in these cases to "recission," where tenant is "return[ed] * * * to as good a position as that occupied * * * before the contract was made").

the Due Process Clause. For example, *BMW*, in determining that a jury's punitive damage award was so "grossly excessive" as to offend the Constitution, identified these guideposts: "the degree of reprehensibility of the [tort]"; "the disparity between the [punishment and] the harm or potential harm [the tort caused]; and the "difference between this remedy and civil penalties authorized or imposed in comparable cases." 517 U.S. at 574-75; *see also id.* (explaining that degree of reprehensibility, "perhaps the most important indicum of reasonableness of punitive damages," is "associated with" physical, as opposed to economic, injury; intentional, rather than careless, wrongdoing; and recidivism – *i.e.*, "repeatedly engag[ing] in conduct, knowing or suspecting that it was unlawful"). They are precisely the same sort of considerations that Petitioners in this case insist housing authorities may freely ignore when making eviction decisions. *See infra*; *but see Bennis*, 516 U.S. at 457-58 (Ginsburg, J., concurring) (identifying State courts' consideration of individual equities as "key" to decision and suggesting that suspension of equitable limitations would raise distinct Due Process concerns).[16]

---

[16]Similarly, the recently enacted Civil Asset Forfeiture Reform Act, Pub. L. 106-185, requires the U.S. government to establish a "substantial connection between the property [forfeited] and the offense," *see Bennis*, 516 U.S. at 454 (Thomas, J., concurring), and protects from deprivation under "any civil forfeiture statute," the property interests of innocent owners – including those who "(i) did not know of the conduct giving rise to forfeiture; or (ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property," 18 U.S.C. § 983(d)(2)(a). *See also id.* § 983 (d)(2)(B) (prohibiting forfeiture of property acquired from wrongdoing spouse if forfeiture "would deprive [innocent spouse] of the means to maintain reasonable shelter in the community for [that spouse] and all dependents residing with [him or her]").

II. The Statute Is Not Reasonably Construed As Authorizing Respondents' Eviction

For the reasons explained above, this case does not require this Court to resolve the constitutionally sensitive questions of federal statutory interpretation that divided the court below. In view of the actual lease terms and specific procedural posture, even an opinion accepting *in toto* HUD's construction of the statute would not impeach the propriety of the preliminary injunction. *See Chevron*, 467 U.S. at 842 ("[T]his Court reviews judgments, not opinions").

But even if these peculiarities did not threaten to make an opinion construing the statute largely advisory in character, the Court may and should sustain the preliminary injunction, without addressing the broad question that HUD strenuously presses upon it, *i.e.*, whether the Affordable Housing Act must be construed (as it largely was by the appeals court majority) as making tenant innocence an *absolute bar* to drug-activity eviction.

While there is compelling support, *Amici* submit, for that construction of the statute, the order preliminarily enjoining Respondents' eviction did not rest on that ground and it needs no such broad rule of law in order to be sustained.[17] Rather, the outcome-determinative legal question here is more narrow: whether, as Petitioners maintain, housing authorities (and courts) are at liberty to *ignore* innocence and other relevant individual circumstances in opting to pursue eviction.

Indeed, the sharp wording of the opinions below should not obscure important ways in which the meaning of § 1437d(*l*)(6)

---

[17]In its preliminary injunction ruling, the district court *declined* to recognize a categorical innocent tenant defense, extending to drug activity that occurred inside tenants' apartments. Pet. App. 166a.

is not open to genuine dispute. First, there can be no real disagreement that cases such as Respondents' fall far from the core concerns that led to enactment of the provision. The congressional finding that framed this provision refers to a "reign of terror" imposed by "drug *dealers*," 42 U.S.C. § 11901(3) (emphasis added), and President Clinton's message calling for a "One Strike" initiative similarly reasoned that residents who "peddle drugs" (not those who use them – let alone the grandparents of those individuals) should be evicted, *see* 32 Weekly Comp. Pres. Documents 584, 585 (Mar. 28, 1996); *Bajakajian*, 524 U.S. at 323 ("Whatever his other vices, respondent does not fit into the class of persons for whom the statute was principally designed: He is not a money launderer, a drug trafficker, or a tax evader"); *cf.* OHA Br. at 3.

Second, it is common ground that Congress did not contemplate – and the statute does not require – eviction of every tenant with a household member who has engaged in drug activity. *See* HUD Br. at 20-21 (under HUD's construction "Section 1437d(*l*)(6) requires [a certain lease provision] * * * * not that the public housing authority must invoke that clause and terminate tenancy in all cases – or in any particular case – of drug-related criminal activity").[18]

---

[18]HUD's confidence that housing authorities, if left to their own devices, would have "[l]ittle incentive," Br. at 45, to evict inequitably seems unfounded. First, housing authorities have a *direct financial incentive* to maintain an aggressive eviction program: HUD's funding formula. *See* 24 C.F.R. § 901.45(c) (providing for grading down for failure "to document results in appropriately evicting" under lease term). Moreover, as Petitioner's Brief stresses, *id.* at 16, housing authorities' waiting lists contain many tenants who – if no less likely to have children or grandchildren who will at some time smoke marijuana, *see supra* – are more "desirable" to the Housing Authority in other ways, including their ability to pay rent. *See* 42 U.S.C. § 1437n; *id.* § 1437n(a)(3)(B)(ii) (authorizing incentives for higher income tenants "to occupy dwelling unit in projects predominantly occupied by * * * families having lower incomes").

In any event, an argument that discretion will seldom be abused is not an argument against independent review for abuse – or against granting relief when it has been.

Nor is there any fundamental disagreement as to the particular factors that bear on the (in)appropriateness of eviction in any individual case – or that innocence is (at least) prominent among them. The most recent version of HUD's regulations explains that denying *dispositive* weight to a tenant's innocence does not mean that the PHA should not

> consider all of the circumstances of the case, including the seriousness of the offense, the extent of participation by family members, and the effect that eviction would have on family members not involved in the prescribed activity and the extent to which the leaseholder has shown personal responsibility and has taken all reasonable steps to prevent or mitigate the action.

24 C.F.R. 966.4(*l*)(5)(vii)(B); *see also id.* (noting availability of remedies short of evicting innocent family members); H. R. Rep. 101-559 (1990) (enumerating similar factors). The Senate Committee described the provision as "mak[ing] criminal activity grounds for eviction of public housing tenants *if* that action is appropriate *in light of all the facts and circumstances*," S. Rep. 101-316 at 179 (1990) (emphasis added), further explaining that eviction "would not be the appropriate course, if the tenant had no knowledge of the criminal activities of his/her guests or had taken responsible steps under the circumstances to prevent the activity." *id.*

Finally, there can be no real disagreement that individualized consideration of these factors in Respondents' cases would strongly militate against eviction, and in the cases

of Lee and Hill – tenants of longstanding, "charged" with having teenage grandchildren who, on a single occasion, possessed marijuana outside their apartments – the question would not even be a close one. *See Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 516 (1997) (even unambiguous statutory words will be disregarded if they will produce a "glaringly unjust result").[19]

Accordingly, Petitioners' attack on the lawfulness of the preliminary injunction depends less on the tenability of their contention that Congress conferred some "discretion" to evict tenants who are not individually culpable, than on their establishing that the statute conveyed authority of a very different sort: "discretion" to *disregard* innocence and evict in cases where that and every other individual circumstance would make eviction *in*appropriate.

Whether or not Congress intended to confer the former sort of authority, this statute simply may not be read as conferring "discretion" of the second, highly unusual kind. *See Kickapoo Tribe v Babbitt*, 43 F.3d 1491, 1497 (D.C. Cir. 1995) ("The exercise of discretion contemplates reasoned decision making on the basis of relevant and appropriate considerations to the task at hand"); *Allegheny County Hous. Auth. v. Hibbler*, 748 A.2d 786, 790 (Pa. Comm. Ct. 2000) (affirming judgment

---

[19]Although Rucker's case presents different and arguably less starkly one-sided equities, her eviction was plainly unauthorized by the lease, and as Petitioners note, OHA has opted not to pursue a termination in her case.

HUD asks the Court to "presum[e]," Br. at 8, that OHA's decision to discontinue proceedings against Rucker is proof that OHA is appropriately exercising its discretion under the statute, but there is *no evidence* in the record that even that decision – let alone the decisions to *go forward* against Hill and Lee – was "based on a consideration of the factors enumerated by HUD." *See* OHA Br. at 45 (asserting that discretion was exercised in Walker's and Rucker's cases).

denying eviction on ground that the "housing authority must consider all circumstances, including mitigating circumstances, when deciding whether to evict").

Not only did Congress identify the relevant factors, but it was not silent as to the necessity of individualized consideration. The House Committee stated that the eviction decision "should require the consideration of all facts and circumstances," and the Senate Committee described § 1437d(*l*)(6) as "making criminal activity grounds for eviction of public housing tenants *if* that action is appropriate *in light of all the facts and circumstances*," S. Rep. 101-316 at 179 (emphasis added); *see also id.* 179 ("eviction would not be the appropriate course * * * if the tenant had * * * taken responsible steps under the circumstances to prevent activity"). Although HUD, *see* Br. at 44, creatively distinguishes between what Congress thinks is "appropriate" under a statute and what it authorizes, such a distinction does not help where, as here, the same term – "appropriate" – is used to describe when, *under the statute*, criminal activity is "grounds for eviction."[20]

To allow eviction of individuals in Respondents' circumstances – in the teeth of the compelling individual equities (and this clearly expressed congressional intent) to the contrary – would be at least an unreasonable interpretation of

---

[20]HUD also argues that the Senate Bill was "quite different" from the legislation enacted. Br. at 43. But the difference identified *has nothing to do with the tenant's culpability* – relating instead to the entirely distinct factor of the gravity of the household member's conduct (the Senate version having expressly limited eviction to cases where drug activities "threaten the heath or safety of, or right to quite enjoyment of the premises by, other tenants"). OHA's attempt to blunt the force of the Senate Committee language is less elegant: it simply changes "*would not* be appropriate" to "might not be," Br. at 19.

the statute, and quite probably an unconstitutional one. The deprivations that Petitioners seek to effect are not only far from the heartland of congressional concern, but they would represent a troubling deviation from the Nation's forfeiture tradition. Unlike governmental actions that this Court has held to be historically sanctioned, Respondents' leasehold was not "used" in the commission of the (misdemeanor) offenses. *See generally Bennis,* 516 U.S. at 455 (Thomas, J., concurring) (in constitutional challenge by an innocent owner, strict adherence "to historical standards for determining whether specific property is an 'instrumentality' of crime" is appropriate). And while construing the statute as authorizing action against innocent individuals would in itself raise serious constitutional difficulties, *see Solid Waste Agy. v. U.S. Army Corps of Engineers*, 531 U.S. 139, 172 (2001), reading it as authorizing complete disregard for innocence (and other similarly relevant factors) would almost surely place it on the other side of the constitutional line. *Bennis*, 516 U.S. at 457-58 (Ginsburg, J., concurring).

Moreover, although Petitioners make an awkward case that some housing authority discretion can, *as a logical matter*, coexist with the "innocent owner" defense made available when the federal government seeks forfeiture of the same public housing leasehold based on the same drug activity, *see* HUD Br. at 28-29, reading the statute to authorize complete disregard of individual circumstances would not fulfill the judicial responsibility "to make sense, rather than nonsense out of the *corpus juris*." *West Va. Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 100 (1991). Even if the U.S. Code did not provide an innocent public housing tenant with quite as much protection as an innocent owner of other property – or even with as much protection as another public housing tenant against whose property the United States, rather than a housing authority, has

elected to move – it must be read to minimize the danger that less blameworthy individuals, whose property is less closely connected to less serious criminal activity will suffer greater dispossession.[21]

Finally, even if it were somehow construed as vesting housing authorities with unusually broad discretion to *seek* eviction, the statute simply cannot be construed as divesting the judiciary of power to exercise independent judgment, as a matter of equity or State law, and deny the drastic remedy the public landlord sought. *See, e.g., Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) ("Unless a statute in so many words, or by a necessary and inescapable inference, restricts the

---

[21]Efforts to distinguish the lease forfeiture and eviction provisions, which originated in the same subtitle of the same statute, Pub. L. 100-690, Subtitle C, based on the differing identities or "capacities," Br. at 29-30, of the governmental entities seeking forfeiture – or the differing "procedural protections" involved – do not stand up to close scrutiny. To begin with, the *purposes* of the two regimes overlap substantially: the government's "law enforcement capacity," HUD Br. at 29, is not obviously different from housing authorities' asserted interest in "deter[ing] drug-related criminal conduct," *id.* at 36, and "protecting the security of the housing project." Moreover, the re-written forfeiture statute has imposed a higher burden of proof and has provided specific hardship-based protection for "residences" of spouses of individuals against whom the Government proceeds. Thus, under HUD's construction, the spouse of a notorious drug felon has greater protection against displacement than would a public housing tenant who has done all that she can to prevent her grandson's one-time use of marijuana.

Similarly, although Petitioners discuss the former provision allowing for admission to public housing of individuals who were evicted on account of family member drug activity, *see* 42 U.S.C. 1437d(c)(4)(A)(iii)(1994), solely as proof that Congress must have contemplated eviction of some innocent tenants, they overlook a much more basic substantive embarrassment: it would be fundamentally irrational for Congress to have provided that the same families who would, under Petitioners' reading, be routinely evicted from public housing would promptly be entitled to preference on seeking readmission.

court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied); *see also City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997). To say the least, the statute does not include the clear congressional statement necessary to accomplish that unusual and disfavored result, and the pertinent legislative history is, once more, specifically and explicitly to the contrary. *See* S. Rep. 101-316 at 179 (indicating that "each case will *require* the wise exercise of humane judgment by * * * the eviction court") (emphasis supplied).

Conclusion

Because there is no basis for disturbing the lower courts' conclusions that the prerequisites for preliminary injunctive relief have been established in this case, the judgment should be affirmed.

Respectfully submitted,

DAVID T. GOLDBERG
Counsel of Record
99 Hudson Street, 8th Floor
New York, NY 10013
(212) 334-8813

JUDITH K. APPEL
DANIEL N. ABRAHAMSON
The Lindesmith Center
717 Washington Street
Oakland, CA 94607
(510) 208-7711

Attorneys For *Amici Curiae*